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Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

BESSIE CARPENTER LOCUS
PETITIONER

VS.

FAYETTEVILLE STATE UNIVERSITY
and DR. ROBERT LEMONS, in his
capacity as Head, Division of
General Studies

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. DOES THE DOCTRINE OF EITHER COLLATERAL ESTOPPEL OR RES JUDICATA PRECLUDE THE PLAINTIFF FROM HAVING A JURY TRIAL ON HER 42 USC 1983 CLAIM OF INTENTIONAL DISCRIMINATION AGAINST DR. ROBERT LEMONS WHERE THIS CLAIM HAD BEEN DISMISSED IN ERROR BY THE DISTRICT COURT JUST PRIOR TO THE BENCH TRIAL FOR INTENTIONAL DISCRIMINATION UNDER TITLE VII AGAINST FAYETTEVILLE STATE UNIVERSITY?

2. WHETHER THE FINDINGS OF THE DISTRICT COURT WERE CLEARLY ERRONEOUS IN LIGHT OF THE DISTRICT COURT FAILURE TO CONSIDER THE PLAINTIFF'S EVIDENCE OF PRETEXT?

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IN THE SUPREME COURT
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BESSIE C. LOCUS
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VS.

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AND DR. ROBERT LEMONS, IN HIS
OFFICIAL AND INDIVIDUAL CAPACITY

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petitioner, Bessie Carpenter Locus, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit refusal to

allow the petitioner a jury trial on the issue of intentional discrimination pursuant to 42 USC 1983 and their refusal to consider the petitioner's evidence of pretext.

OPINIONS BELOW

The unpublished written opinion of the Court of Appeals appears in Appendix C to this Petition and has been cited as Locus vs. Fayetteville State University, No. 90-2604. The inital upbuplished written opinion of the Court of Appeals appears in Appendix F to the Writ. The unpublished Findings of Fact and Conclusions of Law of the district court for the Eastern District of North Carolina appears in Appendix A to the Petition. The unpublished Order of the district court denying petitioner's motion for a new trial is situated at

Appendix B and the district court granting the summary judgment of the respondents is located at Appendix E. The unpublished written Supplemental Pretrial Order of the District Court for the Eastern District of North Carolina appears in Appendix G to the Petition.

JURISDICTION

The Court of Appeals' Opinion in this matter was filed on January 7, 1991. A timely Petition for Rehearing was filed on January 18, 1991. The Court of Appeals' denial of the Petition for Rehearing was issued on March 14, 1991 and is set forth in Appendix D. This Court's jurisdiction is invoked under Title 28, U.S.C. Section 1254(1).

STATEMENT OF THE CASE

A. Procedural History

The United States District Court, Eastern

District of North Carolina, had jurisdiction pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e--2000e-17. The petitioner filed a civil action pursuant to Title VII of the Civil Rights Act against the Fayetteville State University alleging that she was denied a promotion to the position of Academic Advisor on account of her sex and retaliated against for filing her EEOC claim. She also filed a intentional discrimination claim against Dr. Robert Lemons pursuant to 42 USC 1983 and a state claim of intentional infliction of mental distress against Mr. James Scurry, Director, Career Planning and Placement Office. The petitioner later amended her complaint to add a claim for civil conspiracy and named several other respondents to include Dr.

Robert Lemons. The district court granted a summary judgment for the respondents dismissing all of the individual respondents to include Dr. Robert Lemons. By order dated March 8, 1989, the United States Court of Appeals for the Fourth Circuit affirmed the District Court's order.

Five days prior to trial, the district court issues a Supplemental Pretrial Order to clarify which issues and parties remained for trial. The order limited the case to one party, FSU, and the two Title VII issues of discrimination and retaliation. The court held that when it dismissed Dr. Robert Lemons as a co-conspirator in the civil conspiracy claim, it also dismissed him and the intentional discrimination claim under 42 USC 1983 from the lawsuit. The

petitioner later voluntarily dismissed her retaliation claim.

At trial, the petitioner put into evidence her qualifications (computer experience, academic successes and counseling experiences) to demonstrate that she was the best qualified candidate for the academic advisor position. The respondent contended that Mr. Gerald Winfrey was the best qualified applicant and that even had the petitioner been deemed the best qualified, she would not have received the position because it was eliminated. The petitioner then introduced Title III documentation submitted by the respondents to the United States Department of Education demonstrating that the position was left vacant because of her complaint to EEOC and that the duties of the position were

more aligned with her credentials.

At the conclusion of the plaintiff's evidence at trial, the respondents moved under Rule 50 and Rule 41(b) for a involuntary dismissal. This motion was denied by the court. The respondents then rested their case and renewed their motion for an involuntary dismissal and this motion was also denied.

The court then issued findings of fact and conclusions of law and held that while discriminatory intent was a motivating factor in the respondents' decision not to hire the petitioner, it was not a major factor in that the respondent did recommend a better qualified candidate. The court then held that even had the petitioner been selected for the position, she would not have received it since the position had

been eliminated.

The Court of Appeals for the Fourth Circuit affirmed the district court's findings of fact and conclusions of law. The Court of Appeals also affirmed the dismissal of the 42 USC 1983 claim of intentional discrimination against Dr. Robert Lemons through a footnote stating that the claim was barred by the doctrine of preclusion.

B. Factual History

The petitioner was employed at Fayetteville State University (FSU) in the capacity of Administrative Assistant within the Career Planning and Placement Office. She was responsible for counseling students, maintaining a placement library and preparing students for employment and graduate school opportunities. At that time, she

possessed a Master's Degree in Counseling, experience in counseling and teaching at the secondary and college levels and formal computer training and experience. She applied for the Academic Advisor position in June, 1985 in response to vacancy description announcing that the position was immediately available. This position was located in the Division of General Studies which was an academic division headed by Dr. Robert Lemons. This position was funded and controlled by the United States Department of Education (DOE). The duties of that position were to computerize academic records, create computerized study skill programs, teaching orientation courses, and counsel students. The respondents were required to annually submit grant applications

requesting DOE approval to continue the position.

In addition, DOE biannually audited this position to insure that the objectives and goals as agreed upon between the respondents and DOE were being met. The specific objectives for the academic advisor position were 1) To develop and implement a computer assisted orientation course and 2) To develop and implement a computerized academic advisement program for all students. Furthermore, their grant application identified that 100% of the Academic Advisor's time would be spent performing duties to meet these objectives.

The petitioner interviewed for the position with Dr. Lemons on June 28, 1985. During the interview, he informed her that he preferred a male for the

position. He did not review her credential nor asked her any relevant questions about her experiences and educational background. He notified her on June 17, 1985 that another candidate had been selected for the position.

In response, the petitioner then wrote Dr. Charles Lyons, the Chancellor of FSU and informed him of Dr. Lemons' conduct during the interview. The day that he received this letter was the same day that he received formal notification from appropriate University officials that another candidate had been recommended. He misinterpreted her letter as a statement that she had then filed an EEOC claim and he angrily reprimanded her for filing such a claim.

The selection process then abruptly ceased. Both the petitioner and the

candidate selected, Mr. Gerald Winfrey stated that they learned that the position was being held up because of the petitioner's EEOC complaint. Dr. Robert James, the Title III Coordinator and Dr. Robert Lemons testified that they were not initially informed by senior FSU officials as to why the position was not filled but that they felt that it was related to the petitioner's EEOC complaint.

FSU's official reason given to both EEOC was that the duties of the Academic Advisor's position were duplicating other university functions. As such these "duplicated duties" were transferred to another division and the position was not to be filled until a decision was made with regard to what role, design and duties this position would hold.

However, Dr. Robert James, the respondents Title III Coordinator, admitted at trial, that the duties of that position did not duplicate any other functions at the University.

Under the signature and authorization of Dr. Lyons, the respondents continued to request funding and DOE approval of the Academic Advisor position for over a year after it was first announced as vacant. In a January 1986 grant application, over eight months after the petitioner received notice that the position had been filled, the respondents formally requested the extension of this position. Their application noted that the duties of the position remain unchanged and that the position had not been filled because of "complication in Personnel Policies and

Procedure". In his deposition, Dr. Lemons admitted that the "complications" were related to the EEOC Complaint filed by the petitioner.

On July 7, 1986, the respondents supplemented their January application by making a special request for the extension of the Academic Advisor position. In this request, the respondents noted that the duties of the position were changed only in that the duties for that position actually had doubled because of the additional teaching responsibilities for that position.

REASONS FOR GRANTING THE WRIT

I. The district court erred in holding that the petitioner's 42 U.S.C. 1983 claim of intentional discrimination against Dr. Lemons was precluded by collateral estoppel

The March 8, 1988 order of the

district court only dismissed the petitioner's civil conspiracy claim and should not have had an impact on her 42 U.S.C. 1983 intentional discrimination claim. Nevertheless, the district court erroneously and retroactively expanded the scope of that previous order in its August 18, 1989 Pretrial Order when it held that the earlier order had effectively disposed of both the civil conspiracy claim and the 42 U.S.C. 1983 claim as well.

The original complaint contained a claim for intentional discrimination under Title VII against Fayetteville State University and under 42 U.S.C. 1983 against Dr. Robert Lemons in his official and individual capacity. The amended complaint alleged an additional claim of civil conspiracy against five named

individuals to include Dr. Lemons. The district court sustained the summary judgment of the defendants solely on the basis of the intracorporate conspiracy doctrine and dismissed both this claim and the individually named defendants. The 42 U.S.C 1983 intentional discrimination claim against Dr. Lemons was neither challenged by the defendants at that time nor actually ruled upon by the court.

The retroactive expansion of the March 8, 1988 order was first announced to the petitioner in the August 18, 1989 Pretrial Order. This clarification came only five days before the case was originally scheduled for trial and one year after the petitioner had appealed the summary judgment. At that time, the petitioner requested a continuance of the

trial and made an alternative motion for the court to reconsider its August 18, 1989 decision. The district court granted the petitioner the continuance but maintained its stance that the 42 U.S.C. 1983 c .m against Dr. Lemons had been earlier dismissed. The district court found that the petitioner had stipulated in the pretrial order that there was only one party to this litigation. The court based this finding on the fact that only one party defendant, FSU, was listed in the caption of the pretrial order. However, legal and factual issues for the jury were contained in the body of the pretrial order regarding this claim against Dr. Lemons as well as the pendent state claim against Mr. James Scurry.

The state claim and Mr. Scurry were clearly not dismissed until after the

district made its supplemental rulings in August. As such, it was illogical to conclude that the plaintiff had conceded to the single defendant when she clearly intended not only for Dr. Lemons to be a separate defendant, but also Mr. Scurry. A 42 U.S.C. 1983 claim is appropriate in sex discrimination cases such as this one. Brooks vs. Ashtabula County Welfare Dept., 717 F.2d 263 (1983); Dwyer vs. Smith, 867 F.2d 184 (4th Cir. 1989). Furthermore, in Keller vs. Prince George's County, 827 F.2d 952 (4th Cir.1987), the Fourth Circuit held that held denying a plaintiff's demand for a jury trial of her Section 1983 claim because she was also litigating a parallel Title VII claim violated her seventh amendment right to a jury trial.

Nevertheless, the Fourth Circuit

affirmed the district court's dismissal of the 42 U.S.C. 1983 claim against Dr. Lemons with only one comment in a footnote. There it was stated that the petitioner did not challenge the March 20, 1988 order between the time they issued their first appellate decision affirming the dismissal of the conspiracy charge and the district court's entry of judgment for respondent. The Court of Appeals then noted that after the district court made its findings and entered judgment, the intentional discrimination suit against Dr. Lemmons was barred under the doctrine of issue preclusion.

With regard to the Court of Appeals' concerns that the petitioner did not timely challenge the dismissal by the district court, the petitioner

respectfully contends that she immediately challenged the district court's actions when she first learned of the problem which was only five days before the original trial date. At that time, she received a trial continuance and specifically asked the district court to relieve her from the effects of that order. Prior to that time, the petitioner had no reasonable basis to anticipate that the district court had expanded the scope of the March 20, 1988 order to incorporated the Section 1983 claim against Dr. Lemons.

The Court of Appeals also noted that the doctrine of issue preclusion would bar the intentional discrimination claim against Dr. Lemmons. While not specifically cited, the Court of Appeals possibly relied upon Ritter vs. Mount St.

Mary's College 814 F.2d 986 (4th Cir. 1987) which held that a district court's findings in a Title VII suit are preclusive in a subsequent trial to a jury on an ADEA claim even though the ADEA claim itself was filed jointly with the Title VII claim but had been erroneously dismissed by the district court. This precedent was specifically applied to 42 U.S.C. 1983 intentional discrimination claims in Dwyer vs. Smith, 867 F.2d 184 (4th Cir.1989).

It is important to note that the Ritter court relied heavily on Parklane Hosiery Co. vs. Shore, 439 U.S. 332, 99 S.Ct 645, 58 L.Ed.2d 552 (1979) where this Court held that a prior equitable suit would have collateral estoppel effect in a subsequently filed lawsuit. Note, however that Parklane is

distinguishable in that one of the parties attempted to bring a subsequent and separate second lawsuit on the same issues. However, in both this case as was the case in Ritter, the petitioner brought her Section 1983 and Title VII together in the same lawsuit and therefore should now be entitled to a jury determination of all common issues of fact.

The Court of Appeals implementation of this precedent in this case has a devastating and very unfair impact upon the petitioner's rights to a jury trial. Neither the district court nor the Court of Appeals addressed the 42 U.S.C. 1983 intentional discrimination claim against Dr. Lemmons in their earlier decisions. Had this been the case, the petitioner would have put on fair notice to raise

this issue during her initial appeal to the Court of Appeals. The postfactum results of the judgments by the lower courts below essentially place the petitioner in a "catch-22" environment. Her claim is now barred because of a latent misinterpretation by the district court.

The doctrine of collateral estoppel has traditionally applied to parties who have attempted to relitigate identical issues from a prior suit. The fact that a final order and a mandate have been issued does not change the fact that this is still the same case and not a "prior suit". Furthermore, the parties to the claims are different. In the Title VII action, only Fayetteville State University is a defendant. In the 42 U.S.C. 1983 claim, Dr. Robert Lemons is

the defendant in both his official and individual capacity. It would be a total injustice to the petitioner for Dr. Lemmons to escape personal liability for his actions solely on the basis of the adversed Title VII claim of which he did not have an interest.

Even Ritter noted some limitation of the application of the doctrine of collateral estoppel under these circumstances. In that case, it is stated that:

> The limitations on the use of collateral estoppel prevent the use of the doctrine against persons who either were not a party to the former suit, or did not have their interest substantially protected therein. Although there has been a marked departure from this "mutuality" requirement traditionally limiting the use of collateral estoppel, that departure has been conducted with a great degree of caution in light of the inherent danger

> in binding persons by judgment to which they were a party. **It is this "sameness" or mutuality of parties in interest which serves as the basis for the development of the collateral estoppel doctrines.** Id. at 992. (emphasis added).

The petitioner contends that the same "great degree of caution" should have been considered in light of the unfair application of this doctrine of preclusion.

It also appears that the Court of Appeals for the Fourth Circuit is the only circuit presently following this application of the preclusion doctrine. Volk vs. Colen, 845 F.2d 1422, 1437 (7th Cir.1988); Roebuck vs. Drexel University, 852 F.2d 715, 739 (3d Cir.1988); Wade vs. Orange County Sheriff's Office, 844 F.2d 951, 954-55 (2d Cir.1988). Furthermore, in one instance, even the Fourth Circuit departed from this precedent in Swentek

vs. USAIR, INC., 830 F.2d 552 (4th Cir. 1987).

The doctrine of collateral estoppel as applied by the court below serves as a legal trap for the unwary. At least in this circuit, every plaintiff in a Title VII action will feel compelled to appeal the dismissal of any supporting claim for fear of being later precluded by this doctrine. If, but under the circumstances of this case, the precedent of this circuit has created an unfair hardship upon Title VII litigants.

II. The district court erred in not considering the petitioner's evidence of pretext at trial.

The petitioner would urge the Court

to issue writ on this question because the district court's findings of facts and conclusions of law were clearly erroneous in light of the court failure to consider any of the petitioner's evidence of pretext. In the seminal case of McDonnell Douglas Corp. vs. Green, 411 U.S. 792, 93 S.Ct. 1917, 36 L. Ed. 2d 688 (1973), this Court established an inferential route, through the use of a rebuttable presumption, to prove discriminatory intent. In this case, the district court found that the petitioner did establish a prima facie case of discrimination through the direct evidence of Dr. Lemons' discriminatory remarks and actions during the interview for the Academic Advisor position.

The district court accepted the direct evidence of the petitioner as

credible and thus the respondent had the burden of proving that the petitioner would not have been promoted even absent the unlawful discriminatory intent. Smallwood vs. United Air Lines, Inc., 728 F.2d 614, 620 (4th Cir. 1984); Price vs. Waterhouse vs. Hopkins, ____ U.S.____, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). Due to the uncertainty in the law as to whether the respondent had to meet its burden by a preponderance of the evidence or by clear and convincing evidence, the district analyzed the case under both burdens and determined that the evidence presented by the respondents satisfied both burdens.

In effect, the district court ruled that Mr. Winfrey was better qualified than the petitioner and that Dr. Lemons would not have recommended her for the

academic advisor position. The fact that Dr. Lemons interview eight women helped to persuade the district court that Dr. Lemons motivate was not totally bias. However, Dr. Lemons essentially interviewed everyone who applied and met the minimal qualifications. Besides, petitioner contention is not that he did not want to interview females, but instead that he did not intend to **recommend** a female for the position. In addition, the court ruled that even had the petitioner been recommended for the position, she would not have received it because it was eliminated before a selection could be made.

In support of this finding that another candidate was better qualified, the court relied upon the subjective opinion of Dr. Lemons on many critical

areas. For example, the court found that Dr. Lemons considered Mr. Winfrey to have a stronger academic background than the petitioner, even though Mr. Winfrey failed several academic courses, had a lower overall grade point average than the petitioner and majored in a field other than counseling. The court also found that Dr. Lemons was more impressed with Mr. Winfrey's interview even though the petitioner's opportunity during the interview were inhibited by Dr. Lemons' comments concerning his reluctance to recommend another female academic advisor.

The court also found that the petitioner's knowledge of the curriculum was more limited than Mr. Winfrey's knowledge and was gained only from the perspective of counseling students

seeking employment even though the record clearly showed that the petitioner was much more diversified in that she was constantly involved in assisting students and former graduates in locating graduate and professional school opportunities which required a thorough knowledge of the University's curriculum. Finally, the court noted that neither Mr. Winfrey nor the petitioner had significant experience in computer programming or in creating computer modules. This finding was made in light of the evidence demonstrating that the petitioner had successfully competed a academic course in computer programming and had assisted the former academic advisor in preparing some of the computer modules. Meanwhile, Mr. Winfrey testified that he had absolutely no ability to operate a computer nor create

the computer modules as of the time that he applied for the position.

Notwithstanding these findings, the principal contention of the petitioner was that the court was mislead with regard to the actual duties that this position performed in order to persuade the court that Mr. Winfrey was more qualified because his credentials were more aligned with the position. The district court was left with the impression that this position's principle duties were in the area of academic counseling which required an indepth knowledge of the University curriculum. To the contrary, the petitioner put into evidence the respondent's own Title III documentation which proved that the position was more of a computer technician who created computerized

programs and computer modules for the students in the student retention program.

The dilemma for the petitioner was that even though this evidence was admitted into the record, it was not considered by the district court in its decision. The district court's failure to consider this evidence resulted in a distortion of the facts as to the primary functions of the academic advisor position.

Had the trial court properly considered the Title III materials as put into evidence by the petitioner, the district court would have found that the primary function of the academic advisor was to create and test computer modules of various study skills for use by the students in the orientation classes.

These modules were used to supplement the classroom instruction as taught in the orientation classes. Of all the candidates, only the petitioner taught these classes.

The title of the academic advisor position made it appear that the position was principally an academic counseling liaison when in fact, according to the respondents' own DOE records, the primary functions of that position were to computerize study skill programs. The Director of Academic Advisement was responsible for providing the academic counseling that required the through knowledge of the University's curriculum. This is by no means a suggestion that the position did not have any academic counseling responsibilities that required some knowledge of the curriculum. The

Academic Advisor did provide some assistance to the Director in counseling these students. However, the academic advisor was primarily responsible providing the faculty advisors and the students with any necessary study skills resources to make the program more meaningful. This basically included creating and testing computer modules to assist the students studying skills and computerizing the academic advisement program records.

The scope of the Academic Advisor's work was clearly identified in the January 1986 grant application from the respondents to DOE. In summarizing the status of the Academic Advisor and the scope of that position duties during the 1985-85 grant year, it was stated in the respondent's grant application dated

January 15, 1986 that:

> An untimely resignation of the academic advisor combined with complications related to North Carolina Personnel Policies and Procedures have caused "Project Student Retention" to have several academic advisement modules and other activities behind their scheduled completion dates. The program was finally able to fill this position in February of 1986. This person was able to help us complete those modules not completed the year before, work on computerizing the senior class records and was able to complete the modules scheduled for completion during this grant year. Additionally, the academic advisor began field testing some of the modules that have been developed.

The petitioner introduced this evidence to demonstrate the pretexual nature of the respondents' claims that the position was more of an academic counselor and that it was eliminated in August of 1985 pursuant to the recommendation of a task force. As

mentioned earlier, Dr. Lemons admitted in his deposition that the "complications" in filling the position was the EEOC complaint filed by the petitioner. The evidence at trial also proved that the defendants were obligated to fill the position and that the duties of that position were seriously behind schedule because the respondent was taking so long in filling it. This documented evidence completely contradicts the respondent's story.

In September, 1985, one month after the respondents claim that the position was eliminated, the Academic Advisor position was audited by DOE in order to insure that it was in fact performing its duties as prescribed by the grant. In the subsequent audit report, it was stated that as of September, 1985, the

duties of the position remained unchanged even though they had seriously fallen behind schedule because the respondent had not yet begun a search for a candidate. As such, the auditors made a strong recommendation that the position be filled immediately.

In the respondents' report to DOE on July 7, 1986, they specifically outlined the scope of the Academic Advisor's duties as follows:

> The Academic Advisor will continue to work on the computerization of the academic advisement program records. The **remaining time** will be spent field testing and revising all of the modules that have been developed and preparing faculty advisors to implement to computerized academic advisement program.

These written reports which were prepared by Dr. Lemons and Dr. James on behalf of the respondents represented the core of the petitioner's evidence

demonstrating that the Academic Advisor position was not eliminated and that its principle duties were to computerize the academic records and test computer modules of which the petitioner was better qualified. This was the most relevant and critical evidence for the district court to consider since it represent the information and statements of the respondents during the period of time when they claimed the position had been altered by their structural reorganization.

The petitioner recognizes that the stringent requirements of Federal Rule of Civil Procedure 52(a) dictates that the findings of the district court must be affirmed if its account of the evidence is plausible in light of the record in its entirety. Clear error exists only

when the trial judge has produced an illogical, implausible, or internally inconsistent interpretation of the facts or is contradicted by documentary or extrinsic evidence. Ratliff vs. City of Milwaukee, 795 f.2d 612 (7th Cir. 1986). It is our contention that the findings of the trial court are not logical or "plausible in light of the record in its entirety". Furthermore, the findings of the district court were in total contradiction with the Title III documentation prepared and submitted by the respondents to DOE.

The findings of facts as decided by the district court are totally devoid of any mention of the Title III evidence introduced by the petitioner to prove her claim of pretext. The records shows that the recommendation of Mr. Winfrey for the

position was approved at all levels until it reached Dr. Lyons' office. At that point, when the petitioner notified Dr. Lyons of Dr. Lemons' discriminatory remarks, the entire selection process ceased.

The petitioner contends that the position was then not filled because Dr. Lyons feared an upcoming EEOC investigation. The respondents contend that duties of the position were more aligned with Mr. Winfrey's qualification and that the position was never filled because the position was eliminated. The courts findings which essentially adopted the respondent's contentions are internally inconsistent with the respondent's statements and actions. The Title III documentation clearly established that the duties of the

Academic Advisor were more aligned with the petitioner's credentials and that the position had not been eliminated as claimed by the respondents. The clear significance of this documented evidence to the petitioner's case is clarified in Bessemer, where it was stated that:

> Documents or objective evidence may contradict the witness' story or the story itself may be so internally inconsistent or implausible on its fact that a reasonable factfinder would not credit it. Where such factors are present, the court of appeals may well find clear error even in a finding purportedly based on a credibility determination.

While the district court did not consider the documented Title III evidence of the petitioner, the court relied heavily upon a written report from a task force that met two months (in May 1985) before the interview took place and

recommended that the advisement responsibilities of the academic advisement component be transferred to another university function. Although this was essentially the extent of the task forces' recommendation, the court concluded that their recommendation called for the elimination of the Academic Advisor position and that this evidence was sufficient to satisfy the respondent's burden of proof under either Smallwood or Price Waterhouse. It remains the petitioner's contention that the respondents did not satisfy either standard of proof, but regardless, the petitioner's evidence of pretext should have been considered.

It is important to note that this task force report did not mention the academic advisor position by name nor did

it discuss the elimination of its functions. It simply called for the faculty advisors to provide the students in the Student Retention Program with the academic counsel in their particular areas of expertise.

The evidence at trial showed that the academic advisement component (as mentioned by that task force) was comprised of the Director of Academic Advisement and the Academic Advisor. The duties of the Director of Academic Advisement included the academic counseling responsibilities mentioned in the task force's report. As mentioned earlier, the duties of the academic advisor were outlined in the Title III report, although this position did assist the Director in some academic counseling.

The petitioner does not contest the

fact that the respondent did undergo a structural reorganization. What is contested, however, is the impact this reorganization had upon the academic advisor position. The single most important fact overlooked by the district court was that the Director of Academic Advisement and not the Academic Advisor was responsible for the academic counseling of the students in the Student Retention Program. As a matter of fact, after August 1985, the Director of Academic Advisement continued to perform her counseling duties while the Academic Advisor's duties of computerizing records and creating modules were not performed at all because respondent would not fill the position.

The respondents did not provide any evidence that the recommendations of the

task force were implemented. Their only evidence came from Dr. James and Dr. Lemons who indicated at some point they were informed that the position was eliminated. They could not recall exactly when nor from whom they learned this information. However, during the almost two year period when the position was left vacant, both of these witnesses testified that they did not know why the vacancy had not been filled although they felt it was related to the EEOC complaint of the petitioner. Nevertheless, they continued to inform DOE of the need for the position and the senior officials from the respondent continued to approve these submissions.

Dr. Lemons was a member of the task force that the district court held made the recommendation to eliminate the role

of the academic advisor. Dr. Lemons actions taken after this task force issued its recommendation proved that it did not impact upon the academic advisor position as the court found. Dr. Lemons, along with Dr. James and under the authorization of Dr. Lyons, continued to request approval for that position for over a year after this recommendation was made. Furthermore, he testified that:

> ...I wanted that position filled **regardless of the reorganization or anything else**, because I wanted to get those modules and things done, as we were expected to get them done. It took the University a long time and I just believed that maybe the complaint did have something to do with it....

It was clearly illogical for the district court to find that Mr. Winfrey's credentials were more aligned with the requirements of the position and that the

structural reorganization of the respondent caused the elimination of that position. Although the McDonnell Douglas approach is flexible, the petitioner contends that it was mandatory for the district court to consider her evidence of pretext. The documented evidence of pretext presented by the petitioner convincing contradicted the contentions of the respondent and demonstrated that the findings of the district court were clearly erroneous.

For the foregoing reasons, the petition should be granted.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals in this matter. If this Court elects not to address the issues

presented in this writ at the present time, it is requested that matter be remanded back to the lower court with directions to make additional findings with regard to the petitioner's evidence of pretext.

This the 12th day of June, 1991.

James H. Locus, Jr.

James H. Locus, Jr.
Attorney for Petitioner
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Fayetteville, NC 28301
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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

NO. 86-52-CIV-3

BESSIE C. LOCUS
Plaintiff

vs.

FINDINGS OF FACT AND CONCLUSION OF LAW

FAYETTEVILLE STATE UNIVERSITY, et al.,

Defendants

This matter is before the court for findings of fact and conclusions of law after a bench trial held October 23-24 in Raleigh, North Carolina. The plaintiff brought this employment discrimination action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e--2000e-17, alleging that Fayetteville State University ("FSU") intentionally discriminated against her on

account of her sex. The plaintiff took a voluntary dismissal of her retaliation claim prior to trial; all of the individual defendants were dismissed by this court's order of May 20, 1988, which the Fourth Circuit affirmed. having heard the evidence presented at trial and having reviewed the exhibits thereto, this court is now prepared to rule on the plaintiff's intentional discrimination claim.

FINDINGS OF FACT

1. The plaintiff is a female resident of Fayetteville, North Carolina, and a citizen of the United States.

2. The defendant is located in Fayetteville, North Carolina and is a constituent institution of the University of North Carolina system of higher education.

3. The plaintiff worked at FSU as an administrative assistant in the Career

Planning and Placement Office from March 1984 through August 1986.

4. FSU advertised a vacancy in the position of Academic advisor in the Division of General Studies on June 3, 1985.

5. The plaintiff applied for the position of academic advisor in a timely manner.

6. Duties of the academic advisor position included advising students on curriculum matters, teaching orientation classes counseling students and developing computer modules. Academic advisors were also required to set up public address equipment, and the job required a moderate amount of lifting and carrying.

7. The plaintiff met all of the advertised requirements and was qualified for the position.

8. Fifteen people applied for the job;

Dr. Lemons, the Head of the Division of General Studies, selected eight women and three men to be interviewed.

9. The plaintiff was interviewed by Dr. Lemons on June 28, 1985.

10. During this interview, Dr. Lemons indicated to the plaintiff that he was reluctant to hire a female for the job because he was not satisfied with the performance of past females academic advisors. Dr. Lemons felt that the past female employees were reluctant to work evenings, lift heavy bags, and set up the public address system.[1]

11. Approximately 95% of the persons Dr. Lemons had hired in the past to work at FSU were women, including the last two persons hired for the academic advisor position.

12. Dr. Lemons had a discriminatory motive that played some role in his decision not to hire the plaintiff. This discriminatory

intent, although a motivating factor, was not a major factor in his decision. The plaintiff contends that Dr. Lemons excluded her from all consideration because she was a woman and that from the start she never had an opportunity to compete. The court does not accept this contention because Dr. Lemons selected eight women to be interviewed for the vacancy. The plaintiff has present no evidence that Dr. Lemons excluded women from consideration. Nevertheless, the court finds that Dr. Lemons was motivated in part by his prior frustrations with female academic advisors.

13. Dr. Lemons recommended a male, Mr. Gerard Winfrey, for the position on July 3, 1985.

14. The recommendation of Mr. Winfrey was never approved and the academic advisor position has not been filled to this date.

15. Mr. Winfrey was better qualified

than the plaintiff, and Dr. Lemons would recommended her for the academic advisor position even in the absence of his discriminatory motive.

16. Mr. Winfrey had been employed at FSU for more than eleven years; the plaintiff had been employed at FSU for just over one year.

17. Mr. Winfrey earned a bachelors degree in sociology from FSU in 1973 and a masters degree in education from North Carolina State in 1977; The plaintiff earned a bachelors degree in English and a masters degree in counseling from North Carolina A&T. Dr. Lemons considered Mr. Winfrey to have a stronger academic background than did the plaintifff

18. Dr. Lemons had observed Mr. Winfrey's job performance as a University recruiter and admissions officer.

19. Dr. Lemons worked on the same floor

as the plaintiff, and had previously evaluated her performance in her instruction of a freshman orientation class. Dr. Lemons had a greater knowledge of the plaintiff's work and more opportunity to evaluate her work than that of any other candidate.

20. Dr. Lemons considered the job duties of Gerard Winfrey as a recruiter and admission officer to be more closely related to the duties of the academic advisor than that of any other applicant.

21. Mr. Winfrey had an intimate knowledge of the curriculum gained through his work as a recruiter and admissions officer. Mr. Winfrey testified that while working with FSU students at the Fort Bragg satellite campus, he had to monitor their academic performance course by course. While working as a recruiter, Mr. Winfrey counseled prospective students about the FSU curriculum. Dr. Lemons testified that

Mr. Winfrey knew more about the curriculum than even he did. Mr. Winfrey testified that he knew what professors taught 90% of the classes at FSU. The plaintiff's knowledge of the curriculum was more limited and was gained only from the perspective of counseling students seeking employment.

22. Dr. Lemons was impressed by Mr. Winfrey's interview performance and considered him to be enthusiastic and positive.

23. Mr. Winfrey had greater experience setting up the public address equipment and expressed a greater willingness to do so than did the plaintifff

24. At the time of this application, Mr Winfrey was earning $21,500 per year. The academic advisor position he was applying for paid only $20,214 per year. The plaintiff at this time was earning between $15,000 and $16,000 per year. Mr. Winfrey was applying

for a lateral move; the plaintiff was applying for a promotion.

25. Neither the plaintiff nor Mr. Winfrey had significant experience in computer programming or in creating computer modules.

26. Dr. Lemons considered Mr. Winfrey to be "head and shoulders" above the other candidates.

27. Even had the plaintiff been recommended by Dr. Lemons, she would not have been hired because the position was abolished by FSU.

28. On May 14, 1985, two months before the events discussed above, a report was written by an FSU task force recommending that academic advisement responsibilities would no longer be performed in the Division of General Studies; indeed, it was recommended that the Division be "dissolved as an administrative unit." Academic advising would be performed in

the individual academic departments;

> No one is better qualified to academically advise students relative to matters, eg., curricula, etc. in a given academic field than a knowledgeable person trained in the concerned file.....(For example) a student would be assigned an advisor trained in chemistry should his/her (major) intent form show chemistry or to an advisor trained in English should the intent form show English.

Defendant's Exhibit 7, at p. 7-8.

29. Academic advising was, in fact, moved out of the Division of General Studies and into individual departments.

30. Because the recommendation of this task force report were carried out, Mr. Winfrey was never hired for the job even though he was recommended by Dr. Lemons.

31 Even if Dr. Lemons had recommended the plaintiff, she still would never have been hired because academic advising was moved out of the Division of General Studies.

32. In summary, the defendant has proven two independent reasons why the plaintiff would not have ben hired even in the absence of Dr. Lemons' discriminatory intent. First, Mr. Winfrey would still have been recommended because he was more qualified. Second, whoever Dr. Lemons recommended for the position would not have been hired because the position was abolished by the defendant.

CONCLUSION OF LAW

1. All parties are properly before the court, and the court has jurisdiction over this action pursuant to Title VII of the Civil Rights ACt of 1964, 42 U.S.C. Sections 2003-2000e-17. FSU is an employer within the meaning of 42 U.S.C. Section 20003(b).

2. This is an individual disparate treatment case in which the plaintiff has introduced direct evidence of discriminatory motive. This court has accepted that evidence

as credible; therefore, the defendant has the burden of proving that the plaintiff would have not been promoted even absent the unlawful discriminatory intent. Small vs. United Air Lines, Inc. 728 F.2d 614, 620 (4th Choir.1984); Miles vs. M.N.C. Corp. 750 F.2d 867, 875 (11th Cir. 1985); Price Waterhouse v. Hopkins, ____ U.S.____, 109 S.Ct. 1775, 104 L.Ed 2d 268 (1989).

3. Some uncertainty in the law exists as to whether the defendant must meet its burden by a preponderance of the evidence or by clear and convincing evidence. The Fourth Circuit held in Smallwood that the clear and convincing standard applies; however, that case arose under the Age Discrimination in Employment Act. The Supreme Court held in Price Waterhouse that the preponderance standard applies; however, there was no majority opinion in that case. The court,

therefore, has analyzed the evidence under both standards and has determined that the defendant has proven by a preponderance of the evidence and by clear and convincing evidence that the plaintiff would not have been promoted even absent the discriminatory motives of Dr. Lemons.

Accordingly, it is hereby ORDERED that judgment be entered for the defendant on the plaintiff's claim of intentional discrimination.

This the 6th day of November, 1989.

/s/ Malcolm J. Howard
United States District Judge
14A

FOOTNOTES

[1] Dr. Lemons denied having any discriminatory intent or making discriminatory statements. He admitted, having that the plaintiff said during the interview that she could "do anything a man could do". Dr. Lemons claimed that this statement came "out of the blue" and was not in response to any statement that he made. The court does not find Dr. Lemons' testimony to be as credible as that of the plaintiff. It is not likely the plaintiff would have made such a statement unless to respond to some discriminatory intent evidence by Dr. Lemons.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

NO. 86-52-CIV-3

BESSIE C. LOCUS
Plaintiff

vs. ORDER

FAYETTEVILLE STATE
UNIVERSITY, et al.,
Defendants

This matter is before the court on the plaintiff's motion to vacate judgment pursuant to Fed. R. Civ. P. 60 and motion for a new trial or for an amended judgment pursuant to Fed. R. Civ. P. 52 and 59. For the reasons discussed below, the court denies the plaintiff's motions.

FACTS

The plaintiff brought this action rights action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e--

2000e-17, alleging that the defendant discriminated against her on account of her sex. On May 23, 1988, this court dismissed the individual defendants in their entirety and the Fourth Circuit affirmed the dismissal on March 8, 1989. ACcordingly, in the pre-trial order of August 16, 1989, the plaintiff and defendant listed only two parties to this action, Bessie Locus and Fayetteville State University ("FSU"). The court took notice of this fact in its supplemental pre-trial order of August 18, 1989. The case proceeded to trial on October 23-24, 1989, on the plaintiff's intentional discrimination claim against FSU. On November 6, 1989, this court entered findings of fact and conclusions of law in favor of the defendant. The plaintiff now seeks to vacate the order dismissing the individual defendants and also moves the court for a new trial or for an amended judgement

against FSU.

RULE 60 MOTION TO VACATE JUDGMENT

Rule 60 allows relief from a judgment which contains a clerical mistake or which was entered through mistake or inadvertence. The plaintiff, however, does not argue that a clerical error appears in the judgement or that it was entered through mistake; rather, the plaintiff argues that the dismissal of the individual defendants was incorrect on substantive grounds.

This court intended by its May 23, 1988 order to dismiss the individual defendants from this case, and that order was affirmed by the Fourth Circuit. As is evidenced by the pre-trial order in which the parties agreed that the only defendant is FSU, the parties have litigated this case since May 23, 1988 on the assumption that FSU is the only defendant. The plaintiff motion, made after a trial with

FSU as the defendant, can hardly be considered timely.[1] Furthermore, as the court noted in its supplemental pre-trial order, there is no pendent party jurisdiction over the plaintiff's state law claims against the individual defendants. Finley vs. United States, ___ U.S. ___, 109 S.Ct. 1003, 2010,104 L.Ed.2d 593 (1989). Therefore, the Rule 60 motion must be denied.[2]

MOTION FOR NEW TRIAL OR FOR AMENDMENT OF JUDGEMENT

The plaintiff requests the court to reconsider its findings that Mr. Winfrey was the best qualified candidate and the at the position of academic advisor has been abolished by FSU.[3] As to the relative qualifications of mr. Winfrey and the plaintiff, the plaintiff argues once against that she had more computer experience. The plaintiff admitted on cross-examination,

however, that her experience was limited to data entry and that her programming experience included only one class sin the BASIC computer language, which is no longer used in business or academic settings. Mr. Winfrey had comparable data entry experience. This court found that neither Mr. Winfrey nor the Plaintiff had significant experience in creating computer modules (Findings of Fact, No. 25); the plaintiff merely restates the arguments she made at trial.

As to the relative qualification of Mr.Winfrey and the plaintiff regarding their knowledge of the curriculum at FSU, again the plaintiff merely restates the arguments she made at trial. The court, accordingly, relies on its Findings of Fact No. 21 and denies the motion for a new trial and for amendment of judgment.

Finally, the plaintiff contended at trial

and contends against that the academic advisor position was abolished not because of reorganization but because of the plaintiff's complaint. The plaintiff relies on the testimony of two witnesses who "heard" that the position was kept open because of the complaint. The court does not know from whom they "heard" this statement, and the plaintiff has present no documentary evidence to support this contention. There is, however, documentary evidence to support the defendant's contention that it planned to move academic advisement functions out of the Division of General Studies for legitimate reasons, and it is undisputed that the defendant in fact moved academic advising into individual department. Findings of Fact Nos. 28-29.

The plaintiff correctly points out that the academic advisor position also required

the development of a computerized academic advisement system. She contends that for this court to find that the position was abolished , "it would be mandatory for the court to require the defendants to account for all of the functions of this position".

First, according to the job description in FSU's vacancy announcement, the position of academic advisor consisted of academic advising, personal, social and vocational counseling, teaching orientation classes, record keeping and data entry, and other duties. Developing computer modules was merely one of the functions performed by the academic advisor. FSU has conclusively established that the bulk of what the academic advisor did is now preformed in each of the individual academic departments and that this arrangement was planned before the plaintiff applied for the job. Findings of Fact No. 28.

The mere fact that the duties to be performed under the Title III grant and the Project Student Retention were not accounted for does not change the fact that the job of academic advisor in the division of General Studies no longer exists. The plaintiff cites no case law for the proposition that all functions must be accounted for.

Accordingly, it is hereby ORDERED that the motions of the plaintiff for vacation of judgement, for a new trial, and for amendment of judgment be DENIED and that the motion of the defendant for costs be DENIED.

This the 28th day of November, 1989.

/s/Malcolm J. Howard
United States District Judge

FOOTNOTES

[1]The plaintiff is attempting to litigate a section 1983 claim of intentional discrimination against Dr. Lemons. In a subsequent trial, however, the plaintiff would be bound by the findings of fact entered by this court on November 6, 1989, particularly the finding that the plaintiff would not have been promoted even absent the discriminatory motive of Dr. Lemons. The doctrine of issue preclusion would bar an intentional discrimination action by the plaintiff against the defendant

[2]The defendant moves that costs be imposed against the plaintiff for filing this Rule 60 motion; the court denies the motion of the defendant.

[3] The defendant opposes the motion of the plaintiff on procedural grounds. Judgement was entered November 7, 1989, and Rule 52 and 59 provide the plaintiff ten days to file post-trial motions. Plaintiff counsel certifies that he served the motion on the defendant on November 20, 1989, but the envelope was postmarked November 20, 1989, indicating service outside the required time. The court does not address the procedural issue, but denies the motion on their merits.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 90-2604

BESSIE C. LOCUS
Plaintiff - Appellant

vs.

FAYETTEVILLE STATE UNIVERSITY; ROBERT LEMMONS, in his official capacity as head, Division of General Studies; JAMES SCURRY, individually and in his official capacity as Director of Career Planning and Placement;
Defendants - Appellees,

and

CHARLES A. LYONS, individually and in his official capacity as Chancellor of FSU; VALERIA FLEMING, individually and in her official capacity; MATTHEW JARMOND, individually and in his official capacity; ROBERT JAMES, individually and in his official capacity

Defendants

Appeal from the United States District Court for the Eastern District of North Carolina, Fayetteville. Malcolm J. Howard, District Judge (CA 86-52-CIV-H)

Before POWELL, Associate Justice (Retire), United States Supreme Court, sitting by designation, PHILLIPS, CIrcuit Judge, and BUTZNER, Senior Circuit Judge.

PER CURIAM:

Appellant appeals the district court's entry of judgement in favor of the appellee in a Title VII action. Appellant makes several challenges to the district court's rulings and findings of fact, none of which we find persuasive. Accordingly, we affirm the judgement below.

I.

Appellant Bessie Locus was employed by appellee Fayetteville State University as a guidance counselor. In the spring of 1985, the position of academic advisor became vacant. hoping to fill that position, she interviewed Dr. Robert Lemmons who was to recommend one applicant to the Vice-Chancellor of the University. During the interview, Dr.

Lemmons stated that he hoped that the University would hire a male because he was dissatisfied with the performance of past female academic advisors. After interviewing eleven candidates, he recommended that Mr. Winfrey, another employee of the University, received the position.

Winfrey, however, did not become academic advisor because the University eliminated the position. The University claims that the elimination was a result of reorganization its staff. The appellant argues that this was done to cover up Dr. Lemons' act of discrimination against her. In the spring of 1986, appellant filed a complaint with the Equal Employment Opportunity Commission (EEOC) and left the University. The EEOC denied the complaint.

In May of 1986, appellant filed a cause of action in the United States District Court

under Title VII of the Civil Rights Act, 42 USC Section 2000e et seq., and 42 USC Section 1983. She alleged that several members of the University staff had denied her promotion on the basis of her sex. She further claimed that she had been harassed for filing an EEOC complaint and that her supervisor, James Scurry, had intentionally inflicted emotional distress upon her. Appellant later moved to amend her complain.t to include a claim of civil conspiracy against several defendants she claimed had conspired to deprived her of a full and fair determination from the EEOC.

In the summer of 1988, the district court dismissed the civil conspiracy claim on the grounds that it was barred by the intracorporate conspiracy doctrine.[1] It also dismissed all of the individual defendants from the suit. The appellant appealed the order to this Court, which affirmed the order

as it applied to the conspiracy claim. Locus vs. Fayetteville State Univ., No. 88-2561 (4th Cir. Mar. 8, 1989) (unpublished).

In early May of 1989, the appellant moved to amend her complaint in order to add a new party who was not employed by appellee and to increase the amount of damages claimed. She also moved to vacate the district court's 1988 order, arguing that with the new defendant the intracorporate conspiracy doctrine no longer applied. The district court denied the motions. the court then tried appellant's intentional discrimination claim against the appellee.

Sitting without a jury, the court heard testimony for two days and entered judgment in favor of the defendant. It found that Dr. Lemmons had a discriminatory motive in his decision to recommend Winfrey for the position, but in fact Winfrey was better

qualified for the position than the appellant. The court further found that Dr. Lemmons would not have recommended appellant for the position even in the absence of his discriminatory motive. Moreover it found that Lemmons' recommendation was never acted upon because the Academic Advisor position was eliminated. Appellant now appeals that judgment.

II.

Appellant first argues that the district court abused its discretion by not granting her leave to amend her complaint in 1989 so she could add another defendant, and by not vacating its order entered in May of 1988. We review the decision ont to allow appellant to amend her complain.t under an abuse of discretion standard. Davis v. Piper Aircraft Corp. 615 F.2d 606 (4th Cir. 19890); see also Fed. R. Civ. P. 15. A district court's

discretion to deny leave is limited by the general principle embodied in the Federal Rules of Civil Procedure--that leave should be freely granted. Davis, 615 F.2d at 613. Appellant first filed these motions May 21, 1989--three years after filing the original compliant and two months before trial. She could have brought the motion at least six months earlier. We do not believe that under these circumstances, the district court's failure to allow appellant to amend her complain.t amounts to an abuse of its discretion or undermines the principle of liberal amendment.

As for the district court's refusal to vacate its earlier judgment under Rule 60, Fed. R. Civ. P., we also review that decision to determine whether there was an abuse of discretion. Werner vs. Carbo, 731 F.2d 204, 206, (4th Cir. 1984). We find no abuse of

discretion: as the court did not allow appellant to add the new defendant, the intracorporate conspiracy doctrine still applied.

III.

Appellant argues that the district court erred by dismissing James Scurry as a defendant in 1988.[2] Scurry was a defendant to pendent state law claim. Appellant argues that the district court could have entertained this claim by exercising pendent party jurisdiction over Scurry. We disagree. The Supreme court has refused to recognized pendent party jurisdiction in federal courts. See Finley vs. United States, _____ US _____, 109 S.Ct. 2003 (1989); Aldinger vs. Howard, 427 US 1 (1976).

IV.

Finally, appellant challenges several findings of fact made by the district court as

being clearly erroneous. See Fed. R. Civ. P. 52(a). We are not persuaded that the district court erred in making these findings.

Accordingly, the judgement of the district court is

AFFIRMED

FOOTNOTES

[1]This doctrine is simply an extension of the basic principle that a conspiracy requires at least two persons or entities. Under it, conspiracies among agents of one corporation are impossible where those agents are acting within their authority and for the corporation. the rationale is that since the acts of a corporate agent are the acts of the corporation, a conspiracy amongst agents of a corporation is in effect a conspiracy with only one conspirator--the corporation. See Buschi vs. Kirven, 775 F.2d 1240 1251-54 (4th Cir. 1985).

2Appellant also challenges the district court's 1988 order dismissing Dr. Lemmons as an individual defendant in her Section 1983 suit. She did not, however, challenge this order between the time this court issued it decision on the conspiracy charge and the district court's entry of judgement for appellee. She first raised this issue in a Rule 60 motion to vacate the judgement. After the district court made its findings and entered judgement, any intentional discrimination suit by appellant against Dr. Lemmons is barred under the doctrine of issue preclusion.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
NO. 90-2604

BESSIE C. LOCUS
Plaintiff - Appellant

vs.

FAYETTEVILLE STATE UNIVERSITY; ROBERT LEMMONS, in his official capacity as head, Division of General Studies; JAMES SCURRY, individually and in his official capacity as Director of Career Planning and Placement;
Defendants - Appellees,

and

CHARLES A. LYONS, individually and in his official capacity as Chancellor of FSU; VALERIA FLEMING, individually and in her official capacity; MATTHEW JARMOND, individually and in his official capacity; ROBERT JAMES, individually and in his official capacity

Defendants

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Phillips with the concurrence of Judge Butzner and Justice Powell, sitting by designation.

For the Court,

/s/ John M. Greacen
Clerk

FILED: MARCH 14, 1991

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION
NO. 86-52-CIV-3

BESSIE C. LOCUS
Plaintiff
vs.

ORDER

FAYETTEVILLE STATE
UNIVERSITY, et al.,
Defendants

This matter is before the court on the defendants' motion for summary judgment as to the plaintiff's claim of civil conspiracy among and between the defendants. This motion is based on the ground that the defendant are immune from suit on this issue due to the intracorporate conspiracy doctrine. The underlying action which precipitated this motion was filed on behalf of the plaintiff, Bessie C. Locus, on May 2, 1986. In the initial complaint, the plaintiff claimed that the defendants discriminated against her on the basis of her sex in denying her a

promotion to position of academic advisor in violation of Title VII of the Civil Rights Act of 1964 and 42 USC Section 1983. Additionally, plaintiff's complaint alleged that the defendants harassed the plain.tiff in retaliation for the filing of a charge with the Equal Employment Opportunity Commission. By order of this court dated October 28, 1987, the plaintiff was allowed to amend her complaint to add as defendants Dr. Charles A. Lyons, Chancellor of Fayetteville State University; Dr. Valeria Flemming, Provost and Vice-Chancellor for Academic Affairs; Dr. Robert Lemmons, Head Division of General Studies; Mr. James Scurry, Director of Career Planning and Placement; Mr. Matthew Jarmond, Director of Personnel; and Dr. Robert James, Coordinator of the Title III grant, all individually and in their official capacity.

Specifically, the plaintiff, in her

amended complaint, alleges that the defendants were part of the civil conspiracy to deprive her of a promotion to the position of academic advisor and to increase the cost of her discovery. The plaintiff alleges that the defendants conspired between and among themselves to deprive the plaintiff of a full and fair determination by the EEOC of the validity of her sex discrimination charge by providing false and misleading information during the EEOC's investigation.

The individuals the plaintiff has added as defendants in her amended complaint are all employees of the corporate entity, Fayetteville State University. As such, it is alleged by the defendant that the intracorporate conspiracy doctrine prohibits the plaintiff from prevailing on her conspiracy charge.

The intracorporate conspiracy doctrine

was first enunciated in Nelson Radio & Supply Co. vs. Motorola, Inc., 200 F.2d 911 (5th Cir.1952), cert. denied, 345 U.S> 925, 73 S.Ct 783, 97 L.Ed. 1356 (1953). In Nelson Radio & Supply, an anti-trust case, the plaintiff alleged that a conspiracy existed between the defendant corporation and its officer, employees and agents. in dismissing the action, the Fifth Circuit Court of Appeals stated that "a corporation cannot conspire with itself any more than a private individual can..." Id. at 914. The Fourth Circuit first recognized and adopted the intra-corporate conspiracy doctrine in Greenville Publishing Co., Inc vs. Daily Reflection, Inc., 496 F.2d 391 (4th Cir. 1974). The Fourth Circuit has further applied the intra-corporate conspiracy doctrine in civil rights cases. See Eagleston vs. Prince Edwards Volunteer Rescue Squad,inc., 569 F.2d 1344 (E.D. Va. 1983),

affirmed without opinion, 742 F. 2d 1448 (4th Cir. 1984).

After careful review of the pleadings in this case, the court feels that intra-corporate conspiracy doctrine acts as a bar to the plaintiff's civil conspiracy claims against the defendants Fayetteville State University; Dr. Robert Lemmons; Dr. Charles A. Lyons; Mr. James Scurry; Dr Valeria Fleming; Mr. Matthew Jarmond; and Dr. Robert James, individually and in their official capacity. As such, the defendants' motion for summary judgement as to the plaintiff's claim of civil conspiracy is granted and this action is dismissed as to dr. Robert Lemons, Dr. Charles Lyons; Mr. James Scurry; Dr. Valeria Flemming; Mr. Matthew Jarmond; and Dr. Robert James, individually and in their official capacity.

SO ORDERED this 20th day of May, 1988.

/s/Malcolm J. Howard
United States District Judge

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 88-2561

BESSIE C. LOCUS
Plaintiff - Appellant

vs.

FAYETTEVILLE STATE UNIVERSITY; ROBERT LEMMONS, in his official capacity as head, Division of General Studies; JAMES SCURRY, individually and in his official capacity as Director of Career Planning and Placement; CHARLES A. LYONS, individually and in his official capacity as Chancellor of FSU; VALERIA FLEMING, individually and in her official capacity; MATTHEW JARMOND, individually and in his official capacity; ROBERT JAMES, individually and in his official capacity

Defendants- Appellees

Appeal from the United States District Court for the Eastern District of North Carolina, Fayetteville. Malcolm J. Howard, District Judge (CA 86-52)

Before HALL, SPROUSE, AND WILKINSON, Circuit Judges.

PER CURIAM:

Bessie Carpenter Locus, the plaintiff in a civil rights action brought against Fayetteville STate University and several University employees, appeals the order of the district court granting summary judgment in favor of the defendants on her claim of civil conspiracy. Finding no error, we affirm.

I.

The plaintiff was employed by Fayetteville State University as an administrative assistant. in the summer of 1985, a notice of opening for the position of academic advisor was circulated and on June 21, 1985, the plaintiff applied for the position. On July 17, 1985, the plaintiff received a letter from Dr. Robert Lemons, one of the defendant and head of the Division of General Studies, stating that a candidate for the position of academic advisor had been chosen. The plaintiff subsequently learned

that the person recommended for the position was Gerald Winfrey. Convinced that Winfrey had been selected solely because he was a male, the plaintiff filed a compliant with the Equal Employment Opportunity Commission ("EEOC"). That complaint. was subsequently denied when EEOC found no cause as to discrimination and issued a right-to-sue letter.

On May 2, 1986, the plaintiff filed a complaint in district court under Title VII of the Civil Rights Act, 42 USC Section 2000e et seq., and 42 USC Section 1983 alleging that the defendant were guilty of sex discrimination in denying her the promotion to the position of academic advisor. In addition, the complaint alleged that the defendants had harassed her in retaliation for filing a charge with EEOC and also alleged intentional infliction of emotional distress

by her supervisor, James Scurry.

The plaintiff subsequently moved to amen her complaint in the district court to include a claim of civil conspiracy against defendants Dr. Charles Lyons, chancellor of Fayetteville State University; Dr. Valeria Fleming, Provost and Vice-Chancellor for Academic Affairs; Dr. Robert Lemons, head of the Division of General studies; James Scurry, Director of Career Planning and Placement; Matthew jarmond, director of Personnel; and Dr. Robert james, Coordinator of the Title III grant program, all in their official and individual capacities. the motion was granted and the amended complaint was filed. In its plaintiff alleged that the defendants were part of a civil conspiracy to deprive her of a promotion and to increase the costs of her discovery. Specifically, plaintiff alleged that the defendants conspired between and among

themselves to deprive her of a full and fair determination by EEOC of her sex discrimination charge by providing false and misleading information during EEOC's investigation.

The defendants moved for summary judgement on the civil conspiracy claim on the ground that the claim was barred by the intracorporate conspiracy doctrine. The district court agreed and by order dated May 20, 1988, granted the defendants' motion dismissing the action as to the defendants Lemons, Lyons, Scurry, Fleming, Jarmond, James, and the University. On June 3, 1988, the district court entered a final order on the civil conspiracy claim pursuant to Fed. R. Civ. P.54(b). It is form this order that plaintiff appeals.

II.

The intracorporate conspiracy doctrine

had its genesis in Nelson Radio & Supply co. vs. Motorola, Inc., 200 F.2d 911 (5th Cir. 1952), cert. denied, 345 U.S. 925 (1953), an antitrust action based on an alleged conspiracy between the defendant corporation and its officer, employees and agents. In dismissing the action, the court stated:

> It is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more that a private individual can, and it is the general rule that the acts of the corporation. 200 F.2d at 914.

Although it has been criticized, see Novotney vs. Great American Federal Savings U Loan Ass'n, 584 F.2d 1235 (3d Cir. 1978), vacated on other grounds, 442 U.S. 3355 (1979), the validity of the intracorporate conspiracy doctrine was affirmed in Cooperweld Corp. vs. Independence Tube Corp. 467 U.S. 752 (1984). It was recognized and adopted by the Court in Greenville Publishing Co., Inc. Daily

Reflection, Inc., 496 F.2d 391 (4th Cir. 1974).

Appellant does not argue against the validity of the doctrine itself but argues that its application should be limited to antitrust cases. The law of this Circuit tells us otherwise.

In Buschi vs. Kirven, 775 F.2d 1240 (4th Cir. 1985), we found the doctrine applicable in the civil rights context where suit was brought by dismissed state hospital employees under 42 USC Section and Section 1985(3) charging that their discharges were the result of a conspiracy in violation of both their first amendment and due process rights. Further, the intracorporate conspiracy doctrine has been applied in the civil rights area by other courts, Dombrowski vs. Dowling, 459 F.2d 190, 196 (7th Cir. 1972); Herrmann vs. Moore, 576 F.2d 453 (2d Cir. 1978), cert.

denied, 439 U.S. 1003 (1978), Beckerk v. Russek, 518 F. Supp. 1040, 1045 W.D. Va. 1981), aff'd without opinion, 679 F.2d 876 (4th Cir. 1982); Eggleston v. Prince Edward Volunteer Rescue Squad, Inc., 742 F.2d 1448 4th Cir. 1984). We are not persuaded by appellant's argument that the doctrine should be more limited, and her argument that the doctrine is not applicable to civil rights or discrimination cases fails.

III.

Appellant argues that even if the doctrine is applicable in cases involving civil rights or discrimination, it should not be applied here because the facts of this case show it to fall within an exception to the doctrine.

Since the doctrine was first stated in Nelson, exceptions to its have been recognized in certain cases. In Buschi, we noted that

it has been held that the doctrine does not apply where "the plaintiff has alleged that the corporate employees were dominated by personal motives or where their actions exceeded the bounds of their authority." Note, 3 Ga. L. Rev. 591 at 608. We applied the first such exception in Greeville Publishing , supra, an antitrust case involving competitions in the business of local advertising. In Greenville, a defendant officer had a monetary interest in one of the newspapers involved in the suit and therefore stood to benefit personally from the elimination of the other newspaper. Thus, after approving the doctrine we noted that "an exception may be justified when the (corporate) office has an independent personal stake in achieving the corporation's alleged objective." 496 F.2d at 399. The appellant has alleged no personal financial stake here.[1]

As to the second exception, appellant argues that defendants should not have the benefit of the doctrine because they acted beyond their authority.[2] We have not had occasion to adopt or apply this exception and in view of the fat that appellant has failed to alleged facts in her complaint that would make this exception applicable to her case, we need not do so now.[3]

IV.

We concluded that the intracorporate conspiracy doctrine prevents appellant from prevailing on her civil conspiracy claim. Accordingly, the judgement of the district court is affirmed.

AFFIRMED

FOOTNOTES

[1] Appellant argues that the personal stake exception should be read to include not only financial stake, also bad faith and personal motives. We have not taken such an expansive view of this exception and decline to do so now, particularly in light of the fact that she has failed to alleged any facts that would support such an exception.

[2] In Buschi vs. Kirven, supra, we noted that, though less well recognized, other court have held that unauthorized acts of an employee in furtherance of a conspiracy may state a claim under 1985(3). Hodgin vs. Jefferson, 447 F. Supp. 804 (D. Md. 1978).

[3] We decline to address other exceptions to the doctrine argued by the appellant. They have not been adopted by this Court and they are not supported by the facts.

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION
NO. 86-52-CIV-3

BESSIE C. LOCUS
Plaintiff

vs.

SUPPLEMENTAL
PRE-TRIAL ORDER

FAYETTEVILLE STATE
UNIVERSITY, et al.,
Defendants

This is a supplemental pretrial order issued by the court to clarify the issues and parties that are before the court. This matter is currently scheduled for trial beginning Wednesday August 23, 1989, in Fayetteville, North Carolina.

The original complaint in this action, filed in 1986, stated four cause of action against three defendants. The complaint stated a cause of action for sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e et

seq., and a cause of action for retaliatory discharge brought under the same law. The complaint realleged the same facts stated in the sex discrimination claim as a cause of action under 42 U.S.C. 1983, claiming that original defendant Dr. Lemmons violated plaintiff's rights under the Fourteenth Amendment. The complaint further realleged the same facts as the retaliatory discharge claim as stating a pendent state claim for intentional infliction of emotional distress against original defendant Mr. Scurry, plaintiff's immediate supervisor. Plaintiff later filed an amended complaint which alleged a claim for civil conspiracy and named other defendants. By order filed May 23, 1988, this court granted defendants' motion for summary judgment on that claim, and dismissed all of the individual defendants from this action in their entirety. By order entered on March 8,

1989, the United States court of Appeals for the Court Circuit affirmed this court's order. The pre-trial conference in this case was held on August 7, 1989, and the pre-trial order was filed on August 16, 1989. In the pre-trial order, the plaintiff and defendant stipulated that all parties were before the court, and further listed only two parties to this action, being the plaintiff and the defendant Fayetteville State University.

Actions under Title VII may only be brought against the employer, not specific individuals. Also, it is well settled that the concept of respondeat superior does not apply in action brought under 42 U.S.C. Section 1983. Monell vs. Department of Social Services, 436 U.S. 658, 98 S.Ct 2018, 56 L.Ed.2d 611 (1978). The Section 1983 allegations are brought only against Dr. Lemmons. This court's order of May 23, 1988

dismissed him as a defendant and the Fourth Circuit upheld this dismissal. Accordingly, the Section 1983 allegations are moot.

In like manner, this court's May 23, 1988 order also dismissed Mr. Scurry as a defendant. Furthermore, to hear plaintiff's intentional infliction of emotional distress claim, this court would have to exercise pendent party jurisdiction over Mr. Scurry. Under TItle VII, the federal courts have jurisdiction to hear employment discrimination claims against employers, not individuals. "All our cases have held that a grant of jurisdiction over claims involving particular parties does not itself confer jurisdiction over additional claims by or against different parties." Finley vs. United States, ___ U.S._ 109 S.Ct 2003 at 2010, 104 L.Ed.2d 593 (1989). Accordingly, this court will not entertain plaintiff's claim for intentional infliction

of emotional distress.

In summary, it is hereby ORDERED that this case proceed to trial as schedule on August 23, 1989, on plaintiff's claims under Title VII only, against defendant Fayetteville State University. In that Title VII does not confer the right to a jury trial, the trial will be conducted by the court, sitting without a jury.

This the 18th day of August, 1989.

/s/Malcolm J. Howard
United States District Judge

APPENDIX E

AMENDMENT XIV—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION;

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX I

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R. S. § 1979; Dec. 29, 1979, P. L. 96-170, § 1, 93 Stat. 1284.)

(2)

91-106

Supreme Court, U.S.
FILED
AUG 12 1991
OFFICE OF THE CLERK

No. ____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

BESSIE CARPENTER LOCUS,
Petitioner

V.

FAYETTEVILLE STATE UNIVERSITY,
Respondent

Petition For Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED

I. DOES THE COURT OF APPEALS' HOLDING IN THIS CASE VIOLATE PETITIOINER'S RIGHTS AS ENUNCIATED IN ***LYTLE V. HOUSEHOLD MANUFACTURING***, 494 U.S. 543, 108 L. Ed. 2d 504, 110 S. Ct. 1331 (1990)?

II. WAS THE DISTRICT COURT'S REFUSAL TO AMEND JUDGMENT PURSUANT TO FED. R. CIV. P. 52 CLEARLY ERRONEOUS?

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER 1990 TERM

BESSIE CARPENTER LOCUS,
Petitioner

V.

FAYETTEVILLE STATE UNIVERSITY,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

STATEMENT OF THE CASE

The original complaint in this action was filed May 30, 1986 alleging four causes of action against three defendants. The complaint alleged a cause of action against Fayetteville State University (FSU) for sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and a claim of retaliatory discharge brought under the same law. The complaint reincorporated the same allegations stated in the sex discrimination claim as a cause of action under 42 U.S.C. § 1983, claiming Dr. Robert Lemons, in his official capacity as officer, administrator and agent of FSU, violated plaintiff's rights under

the Fourteenth Amendment. The retaliatory discharge allegations were reincorporated as a pendent state claim for intentional infliction of emotional distress against plaintiff's immediate supervisor, Mr. James Scurry. Ms. Locus, the appellant-plaintiff, amended her complaint on October 28, 1987 to allege a civil conspiracy claim and name additional defendants.

Judge Malcolm Howard granted the defendants' summary judgment motion on the civil conspiracy claim and dismissed all of the individual defendants from the case in their entirety. The United States Court of Appeals for the Fourth Circuit affirmed the district court's dismissal of the individual defendants by order entered March 8, 1989. Ms. Locus did not file an appeal.

On May 2, 1989, Ms. Locus moved the court to vacate the judgment entered June 2, 1988 dismissing the action as to defendants Dr. Robert Lemons, Dr. Charles A. Lyons, Mr. James Scurry, Dr. Valeria Fleming, Mr. Matthew Jamond, and Dr. Robert James individually and in their official capacities. Ms. Locus, also, sought to file a second amended complaint to add defendants, claims and increase the amount of compensatory and punitive damages sought. The trial court denied the petitioner's Rule 60(b) and Rule 15(b) motions.

Subsequently, on July 31, 1989, Ms. Locus requested leave to file a third amended complaint. On August 7, 1989, Judge Howard denied her request.

On September 18, 1989, Ms. Locus moved to stay or continue the action and allow further discovery. In an order dated September 22, 1989, Judge Howard denied the requested continuance and ruled against additional discovery.

On October 4, 1989, Ms. Locus moved for a voluntary dismissal of the retaliation claim brought against FSU. By order dated October 16, 1989, Judge Howard allowed Ms. Locus' motion to voluntarily dismiss the retaliation claim against FSU.

A non-jury trial was held on October 23rd and 24th of 1989, with Judge Howard presiding in Raleigh, North Carolina. On November 7, 1989, the court denied Ms. Locus' claims and dismissed the action, ruling the petitioner was to recover nothing from FSU. On November 21, 1990, Ms. Locus moved for a new trial or for additional and amended findings; she also wanted Judge Howard to vacate the May 20, 1988 judgment. On November 30, 1989, Judge Howard entered an order denying Ms. Locus' motion for a new trial, motion to amend findings and motion to vacate the May 20, 1988 judgment. FSU's motion for costs was also denied. Notice of Appeal, from the November 7, 1989 judgment, was given by Ms. Locus on December 22, 1989. The case was argued on October 30, 1990 and affirmed by unpublished opinion on January 7, 1991. On March 14, 1991, Ms. Locus' petition for rehearing was considered by the Fourth Circuit in banc. No member of the entire Fourth Circuit panel even wanted a poll on the petition. Accordingly, it was unanimously denied.

On September 2, 1988, shortly before the statute of limitations, and after all the claims against the individual defendants were dismissed in federal court, Ms. Locus filed a state court complaint alleging the same events that were the subject of the federal lawsuit.

In response to Ms. Locus' state court complaint, the respondent first moved to stay the proceedings and then answered the complaint asserting various defenses including: failure to

state a claim, lack of jurisdiction, sovereign immunity, qualified immunity, good faith exercise of the responsibility conferred upon them to make a professional judgment regarding petitioner's qualification for employment and the intra-corporate conspiracy doctrine. Respondent submitted memoranda in support of the defenses on August 21 and August 29, 1989. On November 8, 1989, transcripts of the depositions of various defendants were submitted by respondent's counsel. On November 17, 1989, supplemental authority pertaining to Ms. Locus' intentional infliction claim was submitted. On November 22, 1989, a motion for collateral estoppel and issue preclusion based on the federal court judgment rendered against Ms. Locus was submitted. Ms. Locus never responded. The Senior Resident Superior Court Judge, D.B. Herring, Jr., ruled on all the motions, except the preclusion motion, on November 27, 1989. Judge Herring did not consider the preclusion motion because it had not been filed ten days before the hearing for all pending motions. The order of dismissal was entered December 5, 1989. Ms. Locus appealed on January 2, 1990. On April 16, 1991, the Court of Appeals affirmed the dismissal of FSU and all official capacity claims. The court remanded the case to allow Ms. Locus an additional opportunity to oppose the respondent's Rule 56 motion for summary judgment. On June 4, 1991, Superior Court Judge Joe Freeman Britt granted the respondent's summary judgment and claims preclusion motions. The petitioner subsequently appealed the court's dismissal. The appeal is still pending.

STATEMENT OF FACTS

The petitioner is a female resident of Fayetteville, North Carolina. (Petitioner's Appendix p. 2a, hereinafter App. p.) The respondent is a constituent institution of the University of North Carolina and is located in Fayetteville, North Carolina. (App. p. 2a) The petitioner worked as an Administrative Assistant in the

Career Planning and Placement Office of FSU from March 1984 through August 1986. (App. pp. 2a-3a) FSU advertised a vacancy for the position of Academic Advisor in the Division of General Studies on June 3, 1985. (App. p. 3a) The job responsibilities included advising students on curriculum matters, teaching orientation classes, counseling students and developing computer modules. (App. p. 3a) Additionally, the Academic Advisor was required to set up public address equipment and perform a moderate amount of lifting and carrying. (App. p. 3a) Fifteen people applied for the job; Dr. Robert Lemons, the Head of the Division of General Studies, selected eight women and three men to be interviewed. (App. pp. 3a-4a) The petitioner was interviewed by Dr. Lemons on June 28, 1985. (App. p. 4a) Dr. Lemons worked on the same floor as the petitioner and had previously evaluated her performance in instructing a freshman orientation class. (App. pp. 6a-7a) Dr. Lemons had a greater knowledge of the petitioner's work and more opportunity to evaluate her work than that of any other candidate. (App. p. 7a) Dr. Lemons recommended a male, Gerard Winfrey, for the position on July 3, 1985. (App. p. 5a) The recommendation of Mr. Winfrey was never approved and the Academic Advisor position was never filled. (App. p. 5a) On May 14, 1985, two months before Dr. Lemons recommended Mr. Winfrey, respondent's task force concluded that academic advisement should be moved out of the Division of General Studies into individual departments. (App. pp. 9a-10a)

Mr. Winfrey had greater experience setting up the public address equipment and expressed a greater willingness to do so than did the petitioner. (App. p. 8a) At the time of his application, Mr. Winfrey was earning twenty-one thousand, five hundred dollars ($21,500) per year. The Academic Advisor position paid twenty thousand, two hundred and fourteen dollars ($20,214) per year. Ms. Locus was earning between fifteen and sixteen thousand dollars ($15,000 to $16,000) per year. (App. p. 8a)

Mr. Winfrey was applying for a lateral move. Ms. Locus was applying for a promotion. (App. pp. 8a-9a)

SUMMARY OF ARGUMENTS

In this brief the respondent argues that the Court should not grant the petition for writ of certiorari because the petitioner has failed to show that the decision below is in conflict with any applicable decision of this Court or any other circuit and has failed to show any other special or important reason for granting the writ.

I.

The Court of Appeals' holding does not violate the petitioner's right to a jury trial in a § 1983 action. All individual defendants were dismissed from the case and that dismissal was affirmed prior to the Title VII trial.

II.

The district court's refusal to amend judgment pursuant to Fed. R. Civ. P. 52 is not an issue which merits this Court's review. It is axiomatic that petitioner's complaint that she was better qualified is factually specific and uniquely personal.

REASONS WHY WRIT SHOULD NOT ISSUE

I. THE COURT OF APPEALS' HOLDING IN THIS CASE DOES NOT VIOLATE THE PLAINTIFF'S RIGHT TO A JURY TRIAL IN A § 1983 ACTION BECAUSE THE 42 U.S.C. § 1983 CLAIM WAS PROPERLY DISMISSED.

The petitioner makes a fundamental misstatement by indicating the district court in its March 8, 1988 order, "only dismissed the petitioner's civil conspiracy claim." The order clearly states "this action is dismissed as to Dr. Robert Lemons, Dr. Charles Lyons, Mr. James Scurry, Dr. Valeria Fleming, Mr. Matthew Jarmond, and Dr. Robert James, individually and in their official capacity." (App. p. 40a) The court of appeals affirmed the dismissal of the individual defendants when this order was appealed in 1988. After a Title VII trial against the one remaining defendant, FSU, the petitioner again appealed. The second appellate panel noted the "Appellate argues that the district court erred by dismissing James Scurry as a defendant in 1988" and . . . "also challenges the district court's 1988 order dismissing Dr. Lemons as an individual defendant in her Section 1983 suit." (App. pp. 31a and 33a) The petitioner seeks to cast the second appellate court decision as upholding "a total injustice [by] allowing Dr. Lemons to escape personal liability for his actions solely on the basis of the adverse Title VII claim of which he did not have an interest." (App. p. 24) In fact, Dr. Lemons and all the individual defendants were dismissed after they made a summary judgment motion. The petitioner made no appeal and raised the issue for the first time, after trial, on November 20, 1989, by requesting Rule 60 relief. Petitioner argued the May 23, 1988 dismissal of the individual defendants was incorrect on substantive grounds. The district court correctly noted Rule 60 allows relief from a judgment which contains a clerical mistake or which was entered through mistake or inadvertence. The

district court reiterated that it intended by its 1988 order to dismiss the individual defendants and the order was affirmed.

Although not cited by petitioner, the case of ***Lytle v. Household Manufacturing***, 494 U.S. 543, 108 L. Ed. 2d 504, 110 S. Ct. 1331 (1990) summarizes his argument. This Court held that the Seventh Amendment precludes according collateral estoppel effect to a district court's determination of issues common to equitable and legal claims where the court resolved the equitable claims first solely because it erroneously dismissed the legal claims. At the beginning of the trial, the district court dismissed Lytle's § 1981 claims concluding that Title VII provided the exclusive remedy for his alleged injuries. The Court of Appeals affirmed the Title VII judgment but noted the dismissal of the § 1981 claims were erroneous because Title VII and § 1981 remedies are separate, independent and distinct. As distinguished from the ***Lytle*** case, two appellate courts have concluded that dismissal of the § 1983 claim was correct. (App. pp. 24a, 33a and 41a-59a) In ***Lytle***, the court resolved the equitable claims first solely because it erroneously dismissed the legal claims. In this case, the legal claims were dismissed and the dismissal affirmed before the equitable claims were ever tried. Neither the appellate court reviewing the dismissal prior to the Title VII trial, nor the appellate court reviewing the district court's refusal to grant Rule 60(b) relief, found error.

II. THE DISTRICT COURT'S REFUSAL TO AMEND JUDGMENT PURSUANT TO FED. R. CIV. P. 52 IS NOT AN ISSUE WHICH MERITS THIS COURT'S REVIEW.

The petitioner contends this Court should issue a writ because the district court's findings of fact and conclusions of law were clearly erroneous. It is axiomatic that petitioner's complaint is factually specific and uniquely personal. No special and important reasons are given as to why the Court should

exercise judicial discretion and accept review. No conflict among court decisions is noted. In substance, as the district court noted in denying the petitioner's motion for a new trial or for amendment of judgment: "the plaintiff merely restates the arguments she made at trial." (App. p. 19a)

The district court and the appellate court justifiably rejected Ms. Locus' arguments. This Court is simply not presented with an appendix record that would allow review even if this Court were so inclined. The standard of review under Fed. R. Civ. P. 52(a) was first enunciated in ***United States v. United States Gypsum Co.***, 333 U.S. 364, 92 L. Ed. 746, 68 S. Ct. 525 (1948), **reh'g denied,** 333 U.S. 869, 92 L. Ed. 1147, 68 S. Ct. 788 (1948). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (emphasis added) **Id.** at 396; ***see also Anderson v. Bessermer City***, 470 U.S. 564, 574, 84 L. Ed. 2d 518, 528, 105 S. Ct. 1504, 1511 (1985) (if the district court's account of the evidence is plausible in light of the record reviewed in its entirety, the reviewing court cannot reverse); ***see also Amadeo v. Zant***, 486 U.S. 214, 100 L. Ed. 2d 249, 108 S. Ct. 1771 (1988) (the "clearly erroneous" standard of review is a deferential one; the district court's decision must be upheld if the court's account of evidence is plausible in light of the record reviewed in its entirety.) Some courts have held that a reviewing court should not consider a contention that a finding of fact was in error without a record on appeal that includes all the evidence on which the district court might have based its findings. ***E.g.***, ***Jensen v. United States,*** 326 F.2d 891 (9th Cir. 1964).

Petitioner failed to present an adequate appendix to allow review according to the applicable standard. Complete review would show the district court's decision was clearly correct. Mr.

Winfrey was the best qualified candidate for a position that was never even filled.

CONCLUSION

Insofar as the petitioner has failed to show that the decision below is in conflict with any applicable decision of this Court or any other circuit and has failed to show any other special or important reason for granting a writ of certiorari in this case, the respondents respectfully request that the Court deny the petition for writ of certiorari.

Respectfully submitted,

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